Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO *and* Neshaminy Constructors, Inc. and United Steelworkers of America, AFL-CIO-CLC. Case 4-CD-556

December 16, 1982

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by Neshaminy Constructors, Inc. (the Employer), on April 1, 1982, alleging that Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO (BCTC), had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to employees represented by local unions which are affiliated with BCTC, rather than to employees represented by United Steelworkers of America, AFL-CIO-CLC (Steelworkers).

Pursuant to notice, a hearing was held before Hearing Officer Charles S. Strickler, Jr., on July 27 and 28, 1982, at Philadelphia, Pennsylvania. All parties appeared at the hearing, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.[1] Thereafter, the Employer filed a brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings made by the Hearing Officer at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The Employer, a Pennsylvania corporation with its principal place of business in Feasterville, Pennsylvania, is engaged in heavy and highway construction. During the 12 months immediately preceding the hearing, a representative period, the Employer had a gross volume of business in excess of $500,000 and purchased and received goods valued in excess of $50,000 from points located outside the Commonwealth of Pennsylvania. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

It is undisputed, and we find, that Steelworkers is a labor organization within the meaning of Section 2(5) of the Act. Counsel for the Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO, declined to stipulate that BCTC is a labor organization, although he noted that he "normally would, to avoid a technical problem." Instead, counsel for BCTC invited the Board to take administrative notice of cases in which BCTC has been found to be a labor organization. Such cases include *The Building and Construction Trades Council of Philadelphia and Vicinity (Samuel E. Long, Inc.)*, 201 NLRB 321 (1973), and *Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO (Altemose Construction Co.)*, 222 NLRB 1276 (1976). There is no evidence that the labor organization status of BCTC has changed in any material respect since these decisions. We take administrative notice of those cases and we find that BCTC is a labor organization within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

The Employer is a member of the Pennsylvania Heavy and Highway Contractors Bargaining Association, a multiemployer bargaining association which has had collective-bargaining agreements with Steelworkers since 1972. The most recent agreement is for a 3-year term, effective February 1, 1982. All of the Employer's nonsalaried employees are represented by Steelworkers.

In July 1981, the Employer was awarded a contract by the city of Philadelphia for the construction of the chlorination facility at the Northeast Water Pollution Control Project being built by the city. The contract is valued at approximately $15 million. On July 27, 1981, the Employer's president, Anthony Canuso, met with Anthony Marrongelle, a business representative of BCTC. Marrongelle told Canuso that BCTC would like to "take in" the Employer, and asked what plans the Employer had concerning subcontracting and new hires at the Northeast site. Canuso stated that the Employer's employees were represented by Steelworkers and that the Employer would not use any nonunion subcontractors. He added that in hiring new employees the Employer would consider

[1] As more fully set forth below, although he entered an appearance at the hearing, counsel for BCTC noted that he did so for the limited purpose of offering a disclaimer of interest in construction work performed by employees of the Employer at the Northeast Water Pollution Control Project in Philadelphia, Pennsylvania, the work in dispute herein.

hiring some of the building trades journeymen, but that they would have to join Steelworkers. Marrongelle objected to this on the grounds that such employees would not make their health and welfare payments into the BCTC fund.

On July 24, 1981, Canuso met with Joe O'Donahue, the then president of BCTC. Canuso told O'Donahue that the Employer planned to subcontract approximately 25 percent of the work at the Northeast Project to "Building Trades subcontractors." O'Donahue said that 25 percent would not satisfy some of his locals and that, if that were the situation, he would recommend that no BCTC subcontractors work for the Employer, and BCTC would picket the site.

Canuso again met with representatives of BCTC on October 14, 1981. On that date Ralph Williams, the business manager of BCTC, reiterated the position taken by Marrongelle, that BCTC would not accept 25-percent subcontracting to its locals, but wanted the "entire job." Marrongelle was also present and suggested that the Employer act as a construction manager for the entire job and subcontract all the work so that it would be performed by employees represented by locals affiliated with BCTC. Canuso refused, and Williams then said that "On that basis, we are going to picket the job." Two subsequent meetings between representatives of BCTC and the Employer, mediated by officials of the city of Philadelphia, were held in an attempt to resolve the dispute. At the second of these meetings, on February 26, 1982, a city official met separately with BCTC's representatives, and then met with Canuso to ask under what conditions the Employer would be willing to give up 100 percent of the work at the Northeast Project. When Canuso said that under no circumstances would it do so, the meeting was adjourned.

On March 11, counsel for BCTC wrote to the Employer to announce that BCTC would picket the worksite to protest the Employer's "destruction" of area standards. When the Employer attempted to begin work at the Northeast Project on March 23, 1982, its employees were met at the entrance by pickets, some of whom carried signs protesting the destruction of area standards. This activity continued on each subsequent day. The picketing involved the blocking of vehicles which were being used to transport employees, materials, and equipment onto the worksite. There were several incidents of violence, including some resulting in damage to Employer-owned vehicles. During the course of the picketing, BCTC did not conduct any investigation into the labor policies of the Employer, and in correspondence with the Regional Director and the Employer it alleged no specific area standards violations other than the assignment of employees across craft lines. On May 26, 1982, the Regional Director dismissed the charge in Case 4–CD–556 on the basis that the picketing was limited to protesting the destruction of area standards, specifically, the Employer's assignment of employees across craft lines. In subsequent correspondence the Employer informed BCTC and the Regional Director that it had discontinued this practice, and would not return to it in the future. In light of this development, the lack of any evidence that the Employer was otherwise in violation of area standards, and the fact that BCTC continued picketing the Employer's Northeast Project worksite, the Regional Director, on June 21, 1982, retracted the dismissal of Case 4–CD–556 and petitioned the United States District Court for the Eastern District of Pennsylvania for an injunction pursuant to Section 10(l) of the Act. The temporary injunction was granted by the court on June 29, 1982, and picketing ceased at the Northeast Project site on June 30, 1982.

On July 1, 1982, however, BCTC began picketing the Employer at a worksite on Roosevelt Boulevard in Philadelphia. On July 15, 1982, the Acting Regional Director sought an injunction pursuant to Section 10(j) against BCTC picketline conduct in violation of Section 8(b)(1)(A). The injunction was granted on July 20, 1982, on which date counsel for BCTC also informed the Regional Office again that BCTC was not seeking assignment of the work described in the notice of hearing herein.

B. *The Work in Dispute*

The work in dispute involves the concrete work and some mechanical work in the construction of large concrete structures for the treatment of sewage at the Northeast Water Pollution Control Project in Philadelphia, Pennsylvania. The Employer's employees will build the foundations, pour the concrete, install piping, and set pumps, valves, and other equipment. Approximately 75 to 80 employees will be utilized in the carpenter, laborer, cement finisher, ironworker, rod setter, driver, plumber, and operating engineer classifications.

C. *The Contentions of the Parties*

The Employer contends that the dispute is properly before the Board, and that the Board should award the work in dispute to its employees who are represented by Steelworkers based on its collective-bargaining agreement with that Union, as well as the factors of company preference, relative skills, efficiency, and economy of operations. It also argues that BCTC's purported disclaimers of

interest in the work are ineffective because they are belied by BCTC's initial demands that the work be assigned to employees represented by local unions affiliated with BCTC, and by the fact that BCTC never investigated to determine whether the Employer was in violation of area standards, but instead continued to picket the Employer's jobsites in a manner unchanged from the initial picketing.

At the hearing, BCTC took the position that the dispute is not properly before the Board because BCTC has repeatedly disclaimed any interest in or claim to any assignment of construction work performed by employees of the Employer at the Northeast Project. BCTC further contended that its picketing of the Northeast Project was purely for the purpose of protesting the Employer's destruction of area standards. BCTC accordingly moved to quash the hearing, and the Hearing Officer held this motion in abeyance for consideration by the Board.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

As noted above, beginning with Canuso's meeting with Marrongelle on July 27, 1981, and continuing thereafter, BCTC sought to have the Employer subcontract the work at the Northeast Project so that employees represented by local unions affiliated with BCTC would be employed to do the work. Following the last of several meetings in which BCTC unsuccessfully sought to gain the Employer's acquiescence in such an arrangement, BCTC announced, by letter of March 11, that it would engage in "area standards" picketing of the Employer's Northeast Project worksite as soon as there was any evidence of the Employer's presence at the site. On March 23, when the Employer first arrived to begin work at the site, BCTC began picketing. The Employer subsequently agreed to cease assigning employees across craft lines—the only violation of area standards alleged to have existed—and communicated this to both BCTC and the Regional Office. This concession, however, brought about no change in the character of the picketing, which continued unabated. No further investigation by BCTC has been shown which could have established that any other violation of area standards was taking place. When BCTC was enjoined from continuing this picketing, it immediately relocated its pickets to another Employer worksite, the Roosevelt Boulevard project, where it had not previously picketed. This conduct, too, was subsequently enjoined. Throughout the course of its picketing, BCTC maintained, in correspondence with the Employer and the Regional Office, that its sole purpose was to protest the destruction of area standards. On the basis of the facts set forth above, however, we conclude that an object of the BCTC conduct was to force or require the Employer to assign the disputed work to employees represented by its affiliated locals. Based on the foregoing, and the record as a whole, we find that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred.[2]

We further find that there is no agreed-upon method for the voluntary adjustment of the dispute to which all parties are bound. As noted above, counsel for BCTC did not participate at the hearing beyond the point at which he offered its disclaimer of interest in the disputed work. No party contends, however, and the record contains no evidence showing, that there exists any agreed-upon method for the voluntary adjustment of this dispute binding all the parties. Accordingly, we find that this dispute is properly before the Board for determination under Section 10(k) of the Act.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[3] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[4]

The following factors are relevant in making the determination of the dispute before us:

1. Certification and collective-bargaining agreements

The Employer and Steelworkers have maintained a collective-bargaining relationship since 1972, by virtue of the Employer's membership in the Pennsylvania Heavy and Highway Contractors Bargaining Association, with which Steelworkers has a collective-bargaining agreement. At the time the dispute arose, and at all times subsequent thereto, the Employer and Steelworkers were parties to a contract which covered the employees who were

[2] Accordingly, we hereby deny BCTC's motion to quash the notice of hearing herein.

[3] *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO [Columbia Broadcasting System]*, 364 U.S. 573, 579 (1961).

[4] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

to perform the work in dispute. At no time material to the dispute has the Employer had a contract with any other labor organization, including any local affiliated with BCTC, covering employees of the Employer performing the work in dispute. Accordingly, we find that the factor of collective-bargaining agreements favors an award of the disputed work to employees represented by Steelworkers.

2. Company preference, past practice, and area practice

The Employer, at the hearing and in its brief, has expressed its preference that the disputed work continue to be performed by employees represented by Steelworkers. While we do not afford controlling weight to this factor, we find that it tends to favor an award of the disputed work to employees represented by Steelworkers.

It is undisputed that the Employer assigns work neither to employees represented by unions other than Steelworkers nor to unrepresented employees. The Employer is one of approximately 25 contractor members of the Pennsylvania Heavy and Highway Contractors Bargaining Association, all of whom follow the same practice of assigning work exclusively to employees represented by Steelworkers. Within the geographical area of the Employer's operations, including eastern Pennsylvania, southern New Jersey, and Delaware, numerous other contractors follow a similar practice, although they are not members of the Association. We therefore find that the factors of past practice and area practice favor an award of the work in dispute to employees represented by Steelworkers.

3. Relative skills, efficiency, and economy of operations

By assigning all work to employees represented by Steelworkers, the Employer achieves various economies and efficiencies. By working within Steelworkers' seniority system, the Employer is able to compute seniority within the Company; this results in greater incentive for an employee to stay with the Employer, and thus to learn the Employer's methods and procedures, making the employee more efficient. The Employer also achieves administrative efficiency in operating under the contract with Steelworkers, and thus making health and welfare payments, fringe benefits, holiday schedules, and monthly reports on a uniform basis under the terms of a single contract, while dealing with a single union staff representative. The collective-bargaining agreement with Steelworkers also provides a single grievance procedure which has proven effective over time. We find, therefore, that the factors of relative skills, efficiency, and economy of operations favor an award of the work in dispute to employees represented by Steelworkers.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that the Employer's employees who are represented by Steelworkers are entitled to perform the work in dispute. We reach this result based on the fact that the Employer's assignment of the disputed work to its employees represented by Steelworkers is consistent with its preference, past practice, and collective-bargaining agreement with Steelworkers, as well as area practice; the fact that employees represented by Steelworkers possess the requisite skills to perform the work; and the efficiency and economy of operations which result from such assignment. We shall therefore determine the dispute before us by awarding the work involved to those employees represented by United Steelworkers of America, AFL-CIO, but not to that Union or its members. Our present determination is limited to the particular dispute which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Neshaminy Constructors, Inc., who are currently represented by United Steelworkers of America, AFL-CIO-CLC, are entitled to perform the construction work at the Northeast Water Pollution Control Project in Philadelphia, Pennsylvania.

2. Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Neshaminy Constructors, Inc., to assign the disputed work to employees represented by that labor organization or local unions affiliated with it.

3. Within 10 days from the date of this Decision and Determination of Dispute, Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO, shall notify the Regional Director for Region 4, in writing, whether it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.